No. 81-55

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In The

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

PAUL IRA FERBER,
Respondent.

On Writ of Certiorari to the
New York State Court of Appeals

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a state penal statute which abridges the public's right to view non-obscene films, magazines and books which portray adolescent sexual conduct, including scientific and educational works, can be sustained under the First Amendment.

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BRIEF FOR RESPONDENT

Statement of the Case

On March 2, 1978 an undercover police officer, posing as an out-of-town salesman and a "collector" of "kiddie porn", purchased from respondent Paul Ferber at the Madison Square Book Shop located at 488 Eighth Avenue, in Manhattan two films involving children. One week later respondent was arrested and his store searched. Subsequently, he was indicted and tried for violating New York Penal Law §§ 263.10 (promoting an *obscene* sexual performance by a child) and 263.15 (promoting a sexual performance by a child).

Respondent argued that Penal Law § 263.15 was unconstitutional because it violated the First Amendment

guarantee of free speech. The Honorable Irving Lang ruled on October 24, 1978 that there was "no constitutional impediment to this legislation" (*People v. Ferber*, 96 Misc.2d 669, 409 N.Y.S.2d 632 [S.Ct., N.Y. Co., 1978]).

Upon the denial of the motion to dismiss, respondent proceeded to trial. The jury, after two days of deliberation, found respondent guilty of violating Penal Law § *263.15* but acquitted him on the counts charging violations of § 263.10 (promoting an *obscene* sexual performance by a child).

On January 31, 1979, the trial court sentenced Paul Ferber to 45 days in prison and a conditional discharge on count three, the same sentence to run concurrently on count four.

On February 28, 1980, the Appellate Division, First Judicial Department of the Supreme Court of the State of New York affirmed respondent's conviction without opinion (74 A.D.2d 558, 424 N.Y.S.2d 967 [1st Dept. 1980]).

New York Court of Appeals Decision

The conviction was reversed and the indictment dismissed on May 12, 1981 when the Court of Appeals held that:

> "[T]he statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal, the statute cannot be sustained . . ." (52 N.Y.2d at 681, 439 N.Y.S.2d at 866).

Relying upon the fundamental tenet that, "First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression . . ." (*Id.* at 679, 439 N.Y.S.2d at 865), the Court of Appeals rejected petitioner's argument that § 263.15 did, in fact, advance the state's interests attributed to it.

> "[I]t is important to emphasize that the statute considered in this case (Penal Law § 263.15) does *not* deal with child pornography. Those who employ children in obscene plays, films and books, are still subject to prosecution as are those who sell or promote such materials (see Penal Law §§ 263.15; 263.10). We merely hold that those who present plays, films, and books portraying adolescents cannot be singled out for punishment, simply because they deal with adolescent sex in a realistic but nonobscene manner" (*Id.* at 681, 439 N.Y.S.2d at 866; emphasis added).

Compounding its unconstitutionality, the Court found that the statute was "strikingly underinclusive":

> "Section 263.15 does not prohibit the knowing sale or promotion of any film, or other item, in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities in which the Legislature in the exercise of its police power has determined is dangerous to the health or well-being of child employees . . ." (*Id.* at 680, 439 N.Y.S.2d at 866).

Summary of Argument

The statute before this Court proscribes nonobscene, clearly protected speech without regard to the context and, indeed, even where it contains scientific, educational or other societal value.

This overbroad enactment outlaws any form of exhibition or distribution of publications containing sexual conduct by a child, whether or not a fee is charged, and is, therefore, at war with this Court's longstanding pronouncements holding that only the sexually obscene fall outside the protections of the First Amendment. *Miller v. California*, 413 U.S. 15 (1973). None of the decisions of this Court justify this abrupt rending of a constitutional weft so deeply woven into the fabric of the First Amendment. This is true especially in view of Penal Law

§§ 263.05 and 263.10 which are clearly adequate to achieve the legislature's goal in stemming actual conduct by young people which may be detrimental to their well-being. (Section 263.05 directly prohibits such conduct, whether obscene or not, and § 263.10 prohibits trafficking by anyone in materials which are obscene and, thus, not within the protective mantle of the First Amendment.)

In striking down the enormously broad provisions of § 263.15, the Court of Appeals properly and responsibly recognized the substantial body of "legitimate" works which are outlawed thereby, but portray sexual conduct by a child which are of scientific, cultural, and/or aesthetic value. No rule of "good faith prosecution" will abate the justifiable fears of the legitimate publishers, producers and directors of this nation who go about the business of preparing serious medical, scientific or other socially valuable works which of necessity contain photographs of adolescent sexual behavior. These individuals will undoubtedly be dunned by the prospect of long-term imprisonment for distributing such materials.

This Court has never sanctioned a *per se* exclusion from the First Amendment's protective shield, but has required that context and societal value be considered in order that the First Amendment's goal of providing a wide range of diverse and conflicting ideas and information be achieved. We join in the state's concern for our young people; however, it cannot be achieved at the expense of the suppression of clearly legitimate and valuable speech. It is not anomalous to our constitutional fabric that we sanction only those laws which directly prohibit the evils sought to be extinguished, *e.g.*, child labor, sexual abuse, and the like, yet still permit the dissemination of visual portrayals regarding those subjects.

In short, the state cannot demonstrate a "more important interest" (*Roth v. United States*, 354 U.S. 476, 488 [1957]) for its total ban on pure, nonobscene speech based solely upon its

sexual content simply by claiming that such a measure is necessary in order to reach "conduct" which may or may not be unlawful.

The decision below represents sound judicial reasoning tied to indispensable constitutional precedent which requires that only obscene materials be curtailed. Indeed, in some other jurisdictions only production of the sexual performance as opposed to the distribution of such materials is outlawed, and then in some cases only when the performance is itself obscene. Since the New York legislature chose to cut a wider swath into the area of protected communications, the decision below represents a responsible judgment calculated to bring New York's provision in line with those of some 31 other states which ban only obscene materials from the marketplace of ideas.

In view of the existing New York statutory mechanism for directly curbing the sexual exploitation of children *at its source*, the extreme caution which must be exercised when First Amendment rights are encroached upon, and considering the lack of proof that dissemination of nonobscene sexually explicit pictures of youth is harmful to the subject or the viewer, this Court cannot, as a matter of law, hold that any interest advanced by petitioner transcends or subordinates the principles fostered by the First Amendment.

POINT I

NEW YORK PENAL LAW SECTION 263.15 IS UNCONSTITUTIONAL. IT WORKS SERIOUS AND SUBSTANTIAL VIOLATIONS OF THE FIRST AMENDMENT BY MEASURES AND MEANS UNNECESSARY TO ACCOMPLISH ITS LEGISLATIVE OBJECTIVES. BY ALL STANDARDS AND PRECEDENTS ESTABLISHED BY THIS COURT TO ACHIEVE A FAIR BALANCE OF RIGHTS IN THE ARENA OF FREE EXPRESSION, THE STATUTE IS CONSTITUTIONALLY INFIRM.

The constitutional controversy over New York's child pornography statutory scheme is ostensibly complicated by the public's justifiable concern over the potential exploitation of children in sexual performances. Their fears and anxieties are legitimate and shared by all parties to this proceeding. When a legal question becomes hostage to fear, however, the capacity to analyze it may be lost and contention absorbs all our intellectual energy. At such moments there is posed the greatest threat to First Amendment freedoms, and it is the discipline and structure of law established by decades of precedent by this Court which stands as a breakwall against their erosion by waves of anxiety-motivated legislation.

Each legal thrust made by petitioner in support of the statute has been proffered to this Court before, given full review and consideration, and rejected. The social concerns behind these legal arguments are assimilated and given a measure of weight in a balancing of interests with expressional freedoms. That balance assumes the form of structural tests and an analytical framework under a host of precedents. It is a resort to those balanced decisions and not reliance upon an absolutist position which respondent calls upon in resolution of the conflict of concerns prompted by § 263.15.

In making their case for the statute, petitioner and its *amici* rely upon socio-legal "facts" whose truths are subject to

question.[1] They claim that present legal tools are inadequate to vindicate the State interest advanced and that therefore a large body of First Amendment precedent should be swept aside in favor of what amounts to a call for a new and dangerously unprecedented "exception" to First Amendment protections. This new *per se* exclusion for nonobscene depictions of adolescent sexual behavior, unlike the scant few others that have been grudingly permitted over the years, would apply no matter what the context of the expression, nor the amount of scientific, educational or social value it contained or fostered. This would constitute a giant leap, to be sure, away from the principles and precedents to which the other grudgingly permitted exceptions have been moored.

As an analysis of its provisions demonstrates, the statute's reach is not simply into the darker recesses of otherwise protected expression which may be typified by the films that were purchased here, or other such materials as may be found in some brightly-lit outlet on "Times Square." The larger, more fearsome reach of its constitutionally ugly tentacles, the fear comprising the bedrock for the decision below, is the fact that it permits the police to prowl the shelves of legitimate bookstores, libraries and educational establishments and prosecute for disseminating what may be valuable educational, scientific or otherwise socially worthwhile works. It is from this untolerable and undeniable overbreadth that the legal evaluation of this statute must begin.

As this Court stated in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973):

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[1]The petitioner's and *amici's* briefs are laced with allegations of "fact", recitations of alleged truisms and *ipse dixit* conentions which were never before the Court of Appeals, never subjected to the truth searching safeguards of a proper hearing process nor in any other way validated to the degree necessary to justify reliability. Most such statements are obvious (Pet. Brief, pp. 7-8), and others which so warrant are given special attention later in this brief.

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

* * *

As a corollary, the Court has altered its traditional rules of standing to permit — in the First Amendment area — 'attacks on overbroad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. . . .' Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statute's very existence may cause others not before the Court to refrain from Constitutionally protected speech or expression (413 U.S. at 611, 612).[2]

Legislative History

In November, 1977, the New York Legislature launched a major offensive against the exploitation of young people in sexual films.[3] The attack was spearheaded by three new sections of the Penal Law — §§ 263.05, 263.10 and 263.15. The stated purpose of this legislation was "to protect children from ex-

[2]Contrary to the claims of petitioner and *amici*, § 263.15 involving as it does "speech" as opposed to "conduct" is not a proper subject for a "case-by-case" analysis, but falls squarely within the full parameters of the overbreadth doctrine as set forth in *Broadrick v. Oklahoma*, 413 U.S. at 616.

[3]"The wave of publicity and the public clamor for immediate action undoubtedly prompted the federal and state legislatures into action. As is the case with most hurried actions, however, what becomes law may not always be the best legislation to deal with the problem, or, perhaps worse, the *legislation may be* unworkable or unconstitutional" (emphasis supplied). Illinois, Legislative Investigating Commn. Report to Illinois General Assembly, Sexual Exploitation of Children, at 192 (Aug. 1980).

ploitation in sexual performances." (*People v. Ferber*, 52 N.Y.2d 674, 678 [1981]; [L. 1977 ch. 910 § 1]).[4]

Section 263.05 makes it a felony punishable by up to fifteen years imprisonment for a person to actually *use* a child in a sexual performance. Section 263.10 makes it a felony punishable up to seven years for a person to promote an *obscene* sexual performance by a child. This latter provision is in accordance with a long line of cases decided in this Court interpreting the First Amendment to exclude sexually related expression which is legally obscene (*Miller v. California*, 413 U.S. 15 [1973]; *Roth v. United States*, 354 U.S. 476 [1957]).

The third section, 263.15, under review here, punishes a person by up to seven years imprisonment for in any way "promoting"[5] an admittedly nonobscene publication as long as it contains in any degree and regardless of the context or societal value, broadly defined "sexual conduct" by a person under sixteen years of age.[6] Section 263.15 eliminates entirely the

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[4]A study of the legislative history, including the commentary shows that scholars, journalists and other interested citizens have cited long lists of potential abuses posed by the statute. Arnold D. Hechtman, a leading authority on statutory construction in New York who wrote the Practice Commentary for § 263.15, noted that the constitutional validity of the statute is suspect due to its broad reach. New York Penal Law Vol. 39 at 434-435 (McKinney).

[5]"Promotion" includes any form of exhibition or distribution whether or not for a fee. (See New York Penal Law Vol. 39, § 263.00[5] [McKinney].)

[6]The statute defines "sexual conduct" to include "lewd" exhibition of the genitals (New York Penal Law § 263.00[3]). "Lewd" is not further defined and can be broadly interpreted to cover a large variety of genital exposure which may be subjectively considered as "lewd". To be sure, "lewd" exhibition is something less than obscene exhibition lest § 263.10 be entirely superfluous. This statutory definition also prohibits obtaining and receiving such nonobscene matter as proscribed by § 263.15. *Cf. Stanley v. Georgia*, 394 U.S. 557, 559 (1969) ([M]ere private possession of obscene matter cannot constitutionally be made a crime).

constitutional prerequisite of obscenity to banning expression having a sexual content.

A. *Section 263.15 is a Classic Example of a Fatally Overbroad Statute Which Here Restricts Protected Speech in Hopes of Affecting Conduct Which May or May Not be Unlawful.*

For over twenty-five years this Court has held that materials of sexual content only fall outside the protection of the First Amendment if they are legally obscene. *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). Indeed, in *Miller*, this Court took great pains to emphasize the need for carefully drawn legislation whenever a state seeks to restrict any form of expression and engineered the three-part constitutional test which must be fulfilled before any work may be deemed obscene. A legion of statutes, no doubt enacted with the same well-meaning interests as those of the New York Legislature, have nevertheless been invalidated because they have strayed from this strict constitutional requirement and its predecessor in *Roth v. United States, id.*[7]

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[7]*See, e.g., Rabeck v. New York*, 391 U.S. 462 (1968) ("magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical difference between the sexes"); *Winters v. New York*, 333 U.S. 507 (1948) ("which tends to incite minors to violent or depraved or immoral acts"); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968) ("portrayal of nudity or sexual promiscuity as 'profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted' "); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959) ("sexual immorality as desirable, acceptable or proper"); *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955) ("approved . . . moral and proper [publications]"); *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954) ("malicious, scandalous and defamatory"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("prejudicial to the best interests of the people"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious"); *Radford v. Webb*, 446 F.Supp. 608 (W.D.N.C. 1978), *aff'd*, 596 F.2d 1205 (4th Cir. 1979) ("any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation");

Footnote continued on next page—

The *Miller* test has flourished because it strikes a reasonable accommodation between the State's interest in controlling obscene material and the public's right to choose what it will read or see. Therefore, no law dealing with expression on the basis of its sexual content can pass constitutional muster unless it contains this essential element. The presence of this constitutional equation is a matter of necessity in order to preserve the purpose of the First Amendment to permit the free flow of knowledge and information regarding a subject as important as adolescent sex. In the words of this Court in *Roth v. United States*, 354 U.S. 476 (1957):

> "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems, this Court said in *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940):
>
> > The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment.
>
> * * *

—Footnote continued from preceding page

Hillsboro News Co. v. Tampa, 451 F.Supp. 952 (M.D. Fla. 1978) ("offensive sexual materials"); *People v. Bookcase, Inc.*, 14 N.Y.2d 409, 252 N.Y.S.2d 433 (1964) ("sale to minor of any book . . . the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality"); *Calderon v. Buffalo*, 61 A.D.2d 323, 402 N.Y.S.2d 685 (4th Dept. 1978), *appeal denied*, 44 N.Y.2d 648, 408 N.Y.S.2d 1023 (1978) ("sale to a minor of any book . . . which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion . . .").

> Freedom of discussion, if it would fulfill its historic function in this nation must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period* (emphasis added)" (354 U.S. at 487, 488).

As this Court pointed out so well in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963):

> "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments . . . [T]he freedoms of expression must be ringed about with adequate bulwarks . . . '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated * * * is finely drawn.'"

Where expression deals frankly with such sensitive and emotional topics as adult and, to a greater degree, child pornography, these "adequate bulwarks" are of increasing value and utility in the preservation of our First Amendment freedoms.

The Obscenity Control Factor

Without the obscenity control factor, § 263.15 is clearly overbroad. It outlaws any production which addresses adolescent sex in a visual format, whether it be a play, a motion picture or scientific text. Regardless of literary, artistic, political or scientific value, any such endeavor falls prey to its criminal punishments. Thus, the court below insightfully noted:

> ". . . [O]n its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a non-obscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose. In

> short, the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to the Constitutional protection from government interference under the First Amendment" (52 N.Y.2d at 678).[8]

Since the statute does not require that the work be "taken as a whole" (*see Erznoznik v. City of Jacksonville*, 422 U.S. 205, n. 7 [1975]), nor that its subject matter be viewed in context, and because it makes no allowance for scientific, educational or other societal value, it fashions a *per se* rule of exclusion. This *per se* approach is unprecedented in First Amendment annals. It permits severe criminal punishment for *bona fide* works of science, medicine or higher learning which portray adolescent sexual conduct which was not unlawful when performed.

Moreover, since the statute punishes with equal force even a fleeting or brief display of the prohibited conduct, such nationally exhibited films as *The Exorcist* (Linda Blair simulating masturbation), *Pretty Baby* (Brooke Shields simulating sexual conduct), and others would be banned in New York, regardless of the fact that the actual underlying activity

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[8]Ironically, many of the studies and reports used by petitioner and *amici* would be non-existent if § 263.15 had already been enacted. The "60 Minutes" broadcast they rely upon is more than likely prohibited. Other materials cited in petitioner's Appendix reflect the author's review of pornographic activity by children. For example, in footnote 3 at p. 5a of petitioner's brief, a reference is made to an article appearing in Ms. Magazine entitled *America Discovers Child Pornography*. Even a casual reading of that article makes it clear that the author viewed visual portrayals of sexual conduct by children. Whomever let the author view those photos, films or live exhibition, whether it be the police, the courts, or social welfare agencies, violated the statute! And indeed, if the definition of "procure" under § 263.00(5) includes mere possession, then the author herself is subject to criminal punishment for her work in preparing that study.

Since petitioner's *amici* often give public presentations in an effort to educate and mobilize the citizenry against the child pornography industry, they would be well advised, in the wake of § 263.15, to limit their efforts by eliminating any visual portrayals which would be in violation of the statute.

portrayed in such works may not have been unlawful in the state where it was produced.[9] A literal application of this untempered legislation would endanger such works as sociological or anthropological documentary films or publications depicting "coming of age" rituals, or a medical text displaying diseased or deformed adolescent genitalia.[10] Also included are illustrated works designed to educate the young regarding adolescent sexuality.[11]

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[9]More than half the states which have enacted so-called child pornography laws, as well as the federal government, only outlaw a portrayal of adolescent sex if it is legally obscene or involves the use of children. These include the so-called enlightened states of California, Connecticut, Illinois, Michigan, Minnesota and Ohio, as well as some of those thought to be conservative, such as Alabama, Florida, Mississippi, North Carolina, South Carolina and Virginia. *See, e.g.*, 18 U.S.C. § 2252; Ala. Code § 13-7-230 *et seq.*; Alaska Stat. § 11.41.455; Ark. Stat. Ann. § 41-4201; Cal. Labor Code § 1309.5; Conn. Gen. Stat. Ann. §§ 53-a-293, 53a-196b (West); Fla. Stat. Ann. § 847.014 (West); Ga. Code Ann. § 54-9903; Idaho Code §§ 18-1517A, 18-4101-03; Ill. Ann. Stat. Ch. 38, § 11-20a (Smith-Hurd); Ind. Code Ann. § 30-11.1; Iowa Code Ann. § 728.12 (West); Kan. Stat. Ann. § 21-3516; Md. Crim. Code Ann. § 419A; Mich. Comp. Laws Ann. § 750.145c; Minn. Stat. Ann. § 716.246; Mo. Ann. Stat. § 568.060; Neb. Rev. Stat. § 28-1463; N.H. Rev. Stat. Ann. § 650:2; Nev. Rev. Stat. § 200.509; N.M. Stat. Ann. § 30-6-1; N.C. Gen. Stat. § 14-190.6; N.D. Cent. Code §§ 12.1-27.1-02, 03; Ohio Rev. Code. Ann. § 2907.321 (Anderson); Ore. Rev. Stat. § 163.477; S.C. Code § 16-15-380; S.D. Codified Laws Ann. 22-22-24, 22-22-25; Tenn. Code Ann. § 39-1019; Tex. Penal Code Ann. Tit. 9, § 43.25 (Vernon); Utah Code Ann. § 76-10-1206.5; Va. Code § 18.2-374.1; Wash. Rev. Code Ann. § 9.68A.030; Wyo. Stat. Ann. § 14-3-102(a)(v)(E). In *State v. Shingaki*, Hawaii Circuit Court, First Circuit Cr. No. 54385, April 27, 1981, held a statute similar to § 263.15 unconstitutional because it too outlawed material that was not obscene.

[10]Since "lewd" exhibition of the genitals is nowhere defined in the New York Penal Law and, in any event, because of its subjective tendencies, escapes precise definition, it thereby further contributes to the breadth of the statute.

[11]In *St. Martin's Press, Inc. v. Carey*, 440 F.Supp. 1196 (S.D.N.Y. 1977), § 263.15 was first declared unconstitutional where the Honorable Robert Ward found it to apply to the critically acclaimed adolescent sex education book, *Show Me*. This decision was later reversed by the Second Circuit on other grounds (605 F.2d 41 [1979]).

Constitutional difficulties arise from § 263.15 because, rather than aim with precision at the heart of the target, the actual conduct, the statute takes aim with shotgun in hand missing some of the serious forms of child abuse that exist (making it underinclusive, see pp. 29-30, *supra*), while at the same time it successfully wounds protected speech with the hope that it will reach the conduct sought to be brought down. While in some areas of legislative concern such imprecision is tolerable, it is in the area of First Amendment freedoms where that toleration ends.[12]

Not only does the statute declare otherwise lawful speech dealing with adolescent sexual conduct, to be *per se* unlawful, it also extends its overbroad reach to conduct which is not considered to be abusive or unlawful in numerous other states from which such materials may emanate (*see* p. 14, n. 9, *infra*).[13]

In the absence of a valid basis, petitioner contends that sexual abuse of a child is suffered and that the same trauma is experienced whether the work which contains the photographs is obscene or not (Pet. Brief, p. 8). Again, this assumes the very point in contention — that the provisions of § 263.15 are, and will be, strictly limited only to instances of child abuse.

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[12]*See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. Raines*, 362 U.S. 17 (1960).

[13]The court below observed:

> "With respect to recorded performances or photographs the statute draws no distinction between those made in this state and those made elsewhere. Anyone who promotes such materials would be subject to prosecution even though the act recorded may have occurred in another state or country where such conduct may not be prohibited. It applies equally to a live performance of a Broadway play and a filmed report of New Guinea fertility rites. Indeed, in this case defendant's conviction did not rest on any contention that the films was made in this state" (52 N.Y.2d at 679-680).

Not every instance of nonobscene but "lewd" exhibition of a child's genitals represents sexual abuse of the child. This is particularly so since "lewd" is not specifically defined and further, its subjective perimeters are not tied to any definite standard, *e.g.*, "Average Adult" (*see Pinkus v. United States*, 436 U.S. 293 [1978]). Thus, a nude photo of a child taken in a neutral, unposed setting or environment for scientific, medical or literary purposes might very well be "lewd" in the eyes of "someone", making the author or producer subject to criminal prosecution. It cannot be said that in those circumstances such children have suffered a psychological trauma and certainly not of the kind or type experienced by those whose interests are the true target of the statute.

Apparently the principal goal of the statute, as borne out by petitioner's brief, is a veiled attack upon this Court's definition of obscenity contained in *Miller*. They argue it is inadequate to suit their needs. The loose provisions of § 263.15, on the other hand, are packed with a greater assurance of prosecutorial success, albeit at the expense of constitutional liberties. In short, the "wide berth" given to First Amendment expression is sacrificed on a statutory altar to the god of expediency.

B. *The* Per Se *Approach of Section 263.15 is Inimical to this Court's Strict Framework for Permitting First Amendment Exceptions.*

This Court has never condoned a wholesale ban on speech because of its content and has always given weight and consideration to the context of the utterance, as well as the responsibility to promote the free exchange of information ranging from the most controversial and distasteful to the most useful and educational (*See, e.g., Cohen v. California*, 403 U.S. 15, 24 [1971]; *Thornhill v. Alabama*, 310 U.S. 88, 95 [1940]).

In the area of obscenity, the now familiar doctrine that ". . . sex and obscenity are not synonymous" (*Roth v. United States*,

354 U.S. at 487) has manifested itself in a number of this Court's decisions, the most recent of which include *Smith v. United States*, 431 U.S. 291 (1977); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); and *Kaplan v. California*, 413 U.S. 115 (1973). These holdings fashioned the "obscenity" exception to the First Amendment. That exception does not work a *per se* ban on speech of a sexual content, but only restricts that which is prurient, patently offensive and lacks serious value. Thus, unlike the present ordinance, the obscenity exception permits the free flow of scientific, sociological and educational works dealing with matters of sex.

This *per se* approach is also out of step with this Court's thinking in other cases involving obscenity and young people. In *Ginsberg v. New York*, 390 U.S. 629 (1968), a ban on the actual distribution of sexual materials to minors otherwise protected as to adults, was upheld based upon a compelling interest to protect such individuals. This ban, however, was not of all sexually oriented materials. It applied only to those which lacked some measure of societal value and otherwise fit a "variable" but nonetheless imposed test for obscenity. Thus, it did not create a *per se* exception as does § 263.15.

If petitioner's claims are viewed in the *Ginsberg* context, the creation of all such materials should be outlawed with a wholesale ban on all distribution because their distribution to minors causes harm or abuse. Clearly, petitioner's approach would be unacceptable if made in the *Ginsberg* situation just as it is here. In both cases, a total, inflexible ban would do battle with the flexibility necessary to achieve First Amendment goals.

In other instances where this Court has permitted an exception to free expression, due regard has always been given to the circumstances and societal worth or value of that expression before it has been restricted.

For example, in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Court permitted an exception for "fighting words", but only after determining ". . . that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth . . ."

A common thread running through the holdings of this Court dictates that § 263.15 proscribing the publication, as opposed to creation, of nonobscene depictions of adolescent sexual behavior, ". . . can claim no talismanic immunity from Constitutional limitations" (*New York Times v. Sullivan*, 376 U.S. 254, 269 [1964]). Such laws as those dealing with "libel", "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, . . . must be measured by standards that satisfy the First Amendment (*Id.*; footnotes omitted). Petitioners and their *amici* eschew any such standards and instead ask this Court to abandon its past practice of preserving nonobscene speech dealing in matters of sex whether it be adult or adolescent as being "overly simplistic" (Pet. Brief, p. 7).

Petitioner goes on to argue:

> "If the sexual abuse of children in the production of films, photographs and live performances is evil and can be prohibited, it would seem to follow logically that the products of that evil can also be prohibited" (Pet. Brief, p. 15).

If this facile approach were adopted by this Court, how soon would it be before someone with another such simple and "logical" approach will argue for another exception based upon an emotional subject thought to be spawned by an interest just as compelling? For example, if murder, drug abuse, arms building or child labor are evil for young and old alike, it would seem to follow that the products of that evil (books or articles

depicting, describing, portraying or providing instructions) can also be prohibited. It is one thing to directly ban by criminalization the actual "evil" act, but it is quite another to silence all discourse or visual representations of the "evil" itself. The former is clearly conduct, while the latter is clearly speech and protected by the Constitution. The unproven assumption that the elimination of speech outlets will discourage those who create such materials is a dangerous doctrine, especially where, as here, it permits no exceptions.

C. *Section 263.15 Does Not Pass The Conduct Regulation Exception to the Free Expression Protections of the First Amendment.*

Section 263.15 seeks to, and does in fact, curtail speech dealing with the subject of nonobscene adolescent sex. Petitioner's and its *amici's* arguments simply amount to a bold claim that the banning of otherwise legal speech may possibly tend to cause the "conduct", (which may or may not be legal), of actually creating materials or performances containing adolescent sex to subside. Thus, the statute seeks to reach conduct both legal and illegal, by imposing a *per se* ban on otherwise protected speech.

This Court has on several occasions faced attempts to censor lawful speech on the proffered grounds that it may cause unlawful "conduct", and has only permitted such speech to be silenced under the most limited of circumstances. *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Here, the petitioner and its *amici* seek to have this Court go beyond those previously drawn boundaries, especially since the present statute is not limited to stemming only unlawful conduct but is intended to ban, through speech curtailment, dissemination of materials lawfully produced under the laws of other sovereignties.

In straining to find support for its position, petitioner tries mightily to stretch and twist this Court's holding in *United States v. O'Brien*, 391 U.S. 367 (1968), to suit its needs.

In *O'Brien*, prosecution was instituted for the conduct of burning a draft card, ostensibly in protest of the Vietnam War. This conduct was proscribed by federal law regardless of the motivation or purpose. That statute, unlike New York Penal Law § 263.15, struck directly at the purported evil conduct and had only tenuous, if any, effect on free expression regarding the Vietnam War. In upholding this purely conduct regulation, this Court employed the following test:

> "[A] governmental regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (*Id.*, 391 U.S. at 377).

When this tripartite test is applied to § 263.15, it clearly fails in all categories. First, whether or not this statute furthers an important or substantial governmental interest is certainly open to question and is not demonstrated on this record.[14] This is especially so when the goal of halting the creation of such materials is sought to be achieved by, at best, the tangential method of banning all distribution of works portraying such conduct.

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[14]This void is not filled by the appendices to Petitioner's and *Amici's* briefs since such materials have never been validated by any hearing process. Indeed, some of these materials post-date the enactment of the statute and present "facts" never put before the Court of Appeals. Moreover, some of these "facts" are rather curious in view of the statement on page 11a of petitioner's brief that "there has been little scientific study" of the alleged "effects" of the actual conduct of producing such material. The petitioner admits the presence of only a "single" case history post-dating the enactment of this statute and, of course, never explored by either side and therefore made a part of the record below (Pet. Brief, p. 11a).

Moreover, under the second prong of the *O'Brien* test, suppression of free expression is directly related to, and is in fact the intended result contemplated by the State in its attempt to achieve its interest.[15] Unlike situations where this Court upheld "conduct" regulation statutes which were "content neutral" and only obliquely touched upon areas of free expression. (*See, e.g., O'Brien, id;* and *Prince v. Massachusetts*, 321 U.S. 158 [1944]), § 263.15 only deals with adolescent sexual activities, and its professed goal is to *curtail* speech on this subject manifested by visual portrayals.

Statutes designed to prevent a particular form or type of communication in order to reach a perceived category of conduct, here child abuse, have only survived constitutional attack where such interest was unrelated to the "suppression of free expression." *See, e.g., Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1965). Section 265.15 deals only with speech relating to adolescent sexual behavior. It does not address numerous other areas which have at least the same degree of tenuous connection to child abuse as § 265.15. In noting this failing, the court below observed:

> "Section 263.15 does not prohibit the knowing sale or promotion of any films, or other item, in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities which the Legislature in the exercise of its police power has determined is dangerous to the health or well being of child employees or employees generally (See, e.g., Penal Law § 260.10, subd 1; Labor Law, § 130 *et seq.;* Education Law §3215 *et seq.;* 3228 *et seq.; cf.* Penal Law, § 245.05, subds. 2, 3). The severe penalties imposed by § 263.15 . . . are reserved for those who

[15]The State clearly expressed its "interests" to include a suppression of such expression upon passage of the statute. *Legislative Findings and Declaration*, L. 1977, New York Penal Law [McKinney] Vol. 39, § 263.00.

promote plays, films, books and photographs, dealing with adolescent sex in a nonobscene manner" (52 N.Y.2d at 680).

Thus, to the extent the statute is designed to protect children from acts detrimental to their well being, it is "strikingly underinclusive" (*Id.* at 680-681). *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975).

Petitioner argues that "there is no evidence to suggest" that these other sources of potential harm are not already effectively dealt with by existing "direct" prohibitions on the use of children in such circumstances. (Petitioner's Brief, p. 28.) The respondents rejoin by pointing out that this is also true as to the statute under consideration.[16]

Furthermore, there is quite a difference between prohibiting the distribution of a publication of nonobscene adolescent sexual activity and prohibiting a non-expressive product manufactured by a child (Petitioner's Brief, pp. 17-18). The former is clearly speech protected by the First Amendment, whereas the latter is merely a product. The difference ought to be patently obvious since a product does not teach, inform or communicate, nor can it be used to educate or convey ideas.

Finally, the statute fails miserably when compared to the third part of the *O'Brien* test since it does not pose only an "incidental restriction" on the First Amendment freedoms, and it is not the least restrictive means essential to vindicate the purported interest.

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[16]Petitioner claims "ample reasons" in support of a contrary conclusion as to adolescent sexual behavior. However, again, straying from the record, it appears that these "reasons" consist of the untested or unvalidated opinions of others formed apparently after the statute was enacted. These untested "opinions," together with hyperbolic statements, such as, it is "beyond argument . . . [that the] production of materials depicting children engaged in sexual conduct is sexual abuse . . . ," do not carry the day. Would it be sexual abuse to film a coming of age ritual or to photograph under clinical circumstances the fully exposed genitals of an adolescent?

Since § 263.05 directly proscribes the actual making of such materials, and § 263.10 directly prohibits the distribution of such materials containing obscene performances, the interest sought to be vindicated is already adequately protected by these provisions.[17] Indeed, § 263.15 covers the very same conduct proscribed by § 263.10 except that the latter includes the constitutionally necessary element of obscenity.

Petitioner repeatedly argues that these provisions are inadequate or ineffective and, therefore, § 263.15 is the only "effective" means available, thus it is no greater than is essential to promote the interest sought to be protected (Petitioner's Brief, pp. 7-8, 12). Their claims, however, are not only self-serving but unfounded and unproven.[18]

It is odd that the petitioner argues on the one hand that the only effective way to halt the "evil" conduct is by banning distribution of representations of "sexual conduct" through the provisions of § 263.15.[19] However, in contradiction, it later

[17]Section 263.05 was recently upheld as constitutional, the courts observing *inter alia* that it, unlike § 263.15, did not infringe upon areas of protected speech. *People v. Weiner*, N.Y.L.J. 11/19/81, Nastasi, J.; *People v. Folk*, N.Y.L.J. 7/10/81.

[18]In *Graham v. Hill*, 444 F.Supp. 584 (W.D. Tex. 1978) a law similar to § 263.15 was struck down for its constitutional infringement. There, the court, faced with a similar claim regarding the necessity of such an overly broad enactment to achieve the declared state purpose, emphasized:

> "[T]his holding does not leave Texas without a means of dealing with the problem of child pornography, quite apart from enforcement of [the invalidated section]. Other of the state's criminal obscenity statutes are addressed to the exploitation of minors in the creation of pornographic materials, and the state has the authority under those laws to prosecute persons who actually use minors in the production or dissemination of obsence materials or performances" (*Id.* at 594).

[19]Petitioner states "prohibiting distribution of the product discourages distributors from selling it and thereby decreases the profits of the producers" (Petitioner's Brief, p. 17).

claims that similar attempts to curb distribution in order to discourage the dissemination of obscenity have failed. (Pet. Brief, p. 20). Thus, by its own admission, lawful restrictions on distribution fail to effectively strike at the heart of the problem as defined. It is for this reason that the more logical, direct and lawful method remains, the actual criminalization of the root conduct.

The petitioner proclaims that this Court's test in *Miller v. California*, 413 U.S. 15 (1973), is inadequate because obscenity convictions are allegedly difficult to obtain (Petitioner's Brief, pp. 8, 21-22). No proof of this *ipse dixit* claim, however, can be found in the record. The fact that the respondent was not convicted under § 263.10 does not attest to the petitioner's contentions since the jury may have reached its verdict because it was unconvinced by the prosecution's witnesses, or because it felt that a conviction under § 263.10 would constitute double punishment since that section contains all the elements of § 263.15. The failure to convict under § 263.10 may also be attributed to the strategical decision to prosecute these films from the standpoint of the average "adult" as opposed to other available methods. *See, e.g., Manual Enterprises v. Day*, 370 U.S. 478 (1962); New York Penal Law, Vol. 39; § 235.05(1) [McKinney].

Moreover, assuming *arguendo* the truth of petitioner's assumptions regarding the difficulty of obscenity prosecutions, is this not as it should be when First Amendment freedoms are hanging in the balance? What the petitioner may view as a prosecutorial hindrance is in reality a constitutional safeguard. Perhaps, in certain locations or communities, obscenity convictions are "difficult" to obtain, and properly so, but that is certainly not synonymous with a claim that they cannot be obtained, and nothing in this record supports a contrary conclusion.[20]

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[20]Indeed, one of the "studies" relied upon by the petitioner notes that convictions under *Miller* have not decreased when the materials presented involve children. Project, *An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U.L. Rev. 810 (1977).

Clearly, neither our founding fathers, nor any decision of this Court has ever promised that it would not be hard work to maintain the delicate balance between claims of legitimate state interests and conflicting expressional rights. The pursuit of exceptions to the free expression rights of the First Amendment should indeed be a difficult task.

D. *The State has Failed to Demonstrate a Compelling, Substantial and Overriding Interest Which Justifies the Massive Infringement of Protected Expression Caused by Section 263.15.*

The State has failed to muster any prior decision of this Court where a *per se* exception was carved out of the First Amendment's zone of protection regardless of the circumstances of the speech or its societal worth. Accordingly, the petitioner seeks sanctuary for its newly conceived exception under the general rubric of a "compelling state interest — less restrictive alternative." This interest is variously expressed, but generally takes the form of preventing conduct which is "physically, pychologically and emotionally harmful" to children (Petitioner's Brief, pp. 14-15).

The protection of such interests has been offered to this Court in the past in attempts to justify the muffling of free expression, and on each occasion has been rejected.

Recently, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), a state law banned the publication of the names of juvenile offenders based upon an assertedly compelling interest designed to foster rehabilitation, avoidance of future anti-social conduct, and unfavorable employment consequences (*Id.* at 104). Nevertheless, in an opinion by Chief Justice Burger writing for a nearly unanimous court, the teachings of *Davis v. Alaska*, 415 U.S. 308 (1974), were drawn upon to reject the state's interest in protecting juveniles in favor of preserving the constitutional right at stake. Similarly, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), a statute based upon a professed state interest similar to that advanced here.

prohibiting the publication of the names of youthful rape victims to avoid numerous stated consequences, was voided as not being based upon an overriding compelling state interest.

It is also no answer to suggest that rights of free expression should depend upon the good faith judgment of the police to forego arrest for the distribution of legitimate scientific or educational works, or that a distributor can always defend a felony indictment on the basis that the statute is unconstitutional as applied to the facts of his case (Pet. Brief, p. 26). This Court has never condoned such an unsatisfactory substitute for the precise regulations necessary in the First Amendment area since "'[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions' *NAACP v. Button*, 371 U.S. 415, 453 . . . [1963]" *Dombrowski v. Pfister*, 380 U.S. 479, 486 [1965].

E. *Contraband and Trafficking Statutes are Inapposite Analogies to Legislation Which Restricts Free Speech and, Unlike Those Provisions Section 263.15 Does Not Require a Violator to Play a Part in the Underlying Illegalities, and Since Section 263.15 Punishes Even Where there is No Underlying Illegality.*

Amicus curia Covenant House attempts to analogize Section 263.15 to three federal trafficking statutes: 18 U.S.C. § 2511(1)(c), which forbids the disclosure of information obtained through illegal wiretapping; 18 U.S.C. § 1952, which prohibits the promotion of racketeering; and 18 U.S.C. § 1084(a), which outlaws the transmission of wagering information.

In each instance, however, the offending disseminator must have been involved in the underlying criminal conduct or an integral part thereof: illegal wiretapping under § 2511(1)(c), racketeering under § 1952, and wagering under § 1084(a). *See United States v. Barbieri*, 614 F.2d 715, 717 (10th Cir. 1980),

(interpreting 18 U.S.C. § 1952); *Kelly v. Illinois Bell Telephone Co.*, 210 F.Supp. 456 (N.D.Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963).

Section 1084(a) requires on its face that the transmittor be, "engaged in the business of betting and wagering", which underlying conduct is unlawful. Moreover, it creates a specific exception for the legitimate uses of wagering information through § 1084(b) which, accordingly, rescues it from the vice of overbreadth.

These statutes require that the distribution of the information be an integral part of the underlying crime. *See United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). Section 263.15, on the other hand, still punishes even where the publisher obtains his material quite lawfully.

Under 18 U.S.C. § 2511(1)(c) disclosure is criminal only when the distributor knows that the information he distributes is illegal due to the fact that it was improperly intercepted under subsection (1)(a) of § 2511. Thus, a crime must already have been committed and the distributor or publisher must have knowledge of this fact. *See Smith v. California*, 361 U.S. 147 (1960).

It is clear that in each instance there must be a predicate illegality and thereafter disclosure or transmission of this illegal information. Under 18 U.S.C. § 2511(1)(c), for example, if the overhearing of the communication was itself legal, *i.e.*, there was no violation of subsection (a), then disclosure of this information does not violate subsection (c) of § 2511(1). *See United States v. Harpel*, 493 F.2d 346, 350 (10th Cir. 1974). Furthermore, under §2511(1)(c), the content of the transmission is irrelevant. Whereas, under New York Penal Law § 263.15 it is only the distribution of materials containing adolescent sexual conduct which is criminalized.

The New York Legislature made no allowance for the intent of the distributor (with the intent to further conduct proscribed by §§ 263.05 or 263.10) or for the context within which the distribution occurs (*e.g.*, distribution of sexual performances by children for purposes of criminal investigation, scientific or medical study, etc.). Thus, the First Amendment claims of those actually engaged in criminal conduct can, of course, be legitimately rejected, but not those of legitimate book publishers and other writers and distributors of nonobscene, constitutionally protected materials. As one court noted in interpreting 18 U.S.C. § 1952:

> "It is clear that speech or conduct ordinarily protected by the Constitution may lose that protection *because of the intent of the speaker or actor or the context in which it occurs. E.g. Ginzburg v. United States*, 383 U.S. 463, 86 Sup. Ct. 942, 16 L.Ed. 31 (1966). The communication of opinions as to the outcome of future athletic contests may not threaten valid community interests *in other contexts*, but such communication clearly threatens legitimate community interest when it occurs as part of an illegal gambling operation crossing state borders" *(United States v. Cerone*, 452 F.2d at 286; emphasis added).

Section 263.15 takes no account of context or intent. It therefore touches solely upon protected speech in its overbroad sweep. This makes § 263.15 a statute of a different species from the trafficking legislation employed by petitioner. An analogy between § 263.15 and these contraband or trafficking statutes merely illustrates further the unconstitutionally overbroad nature of New York Penal Law § 263.15.

Conclusion

Legislation has never been upheld because it was passed with the best of intentions or in earnest. The well-meaning actions of our legislators are no substitute for the continuation of this Court's constitutionally necessary policy of subjecting all assaults upon the citadel of the First Amendment to the most exacting and rigorous standards.

In the wasteland of exceptions to the guarantee of free speech, a proscription has only been established when it was determined to be based upon a standard which permitted consideration of, and allowance for, the context of the expression and its capacity for promoting or expounding ideas, information or matters of social value. To uphold this statute would signal an abandonment of this long-standing commitment and would constitute what may be the first step in the demise of the First Amendment. To this invitation to erode sound precedent, this Court should, as it has in the past, bark a resounding "No!"

For all the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

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